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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 580

ALBERT F. GRAHAM,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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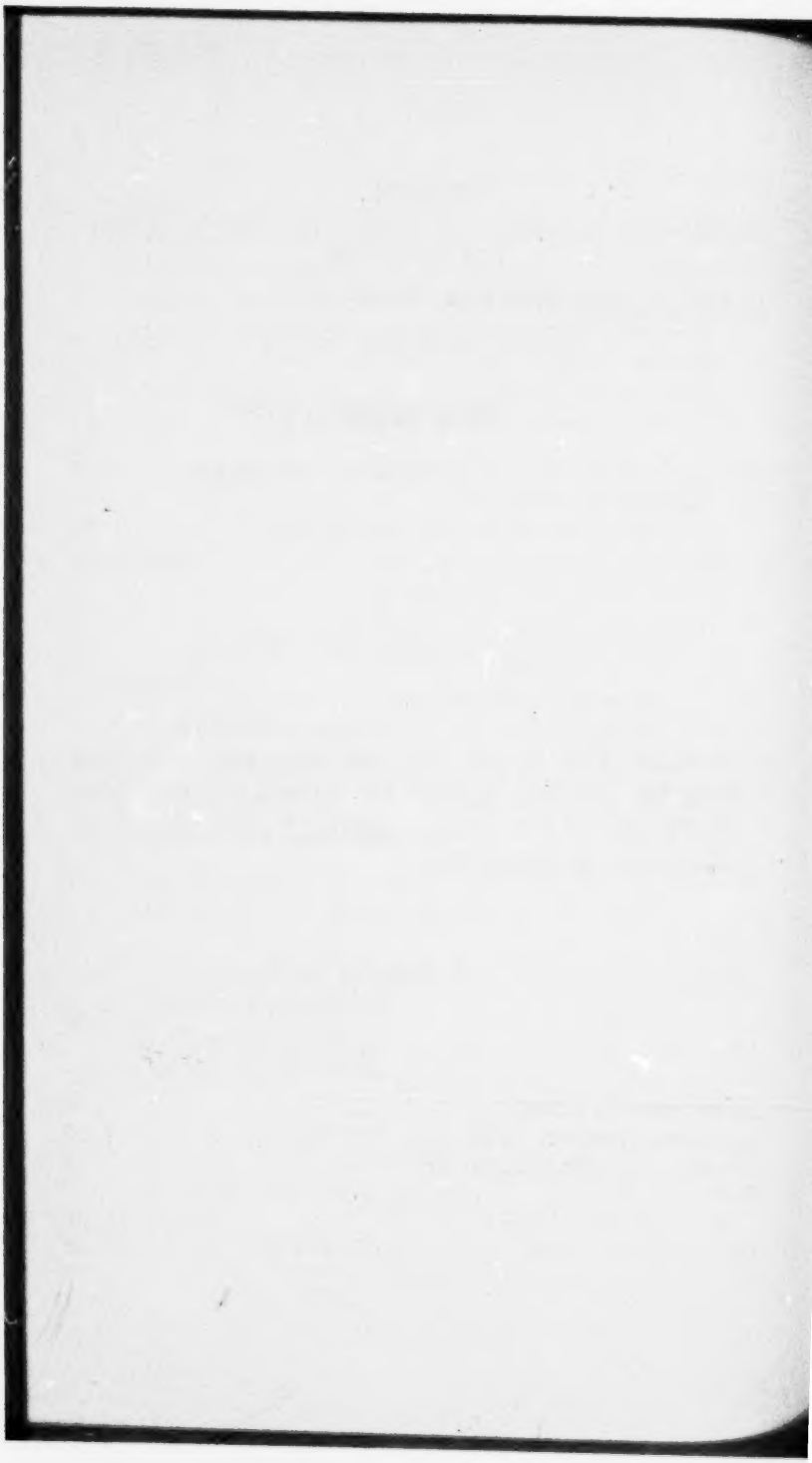

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Jurisdictional statement	11
Question presented	12
Reasons relied on for allowance of writ	13
Prayer for writ	16
Brief in support of petition for writ of certiorari	17
Opinions of courts below	17
Jurisdiction	17
Statement of the case	18
Specification of errors	18
Argument	18
Summary of Argument	18
Point A	20
Point B	34
Point C	38
Point D	51
Conclusion	52

Table of Cases Cited

Atkinson v. *United States*, 53 App. D. C. 277, 279	29
Bird v. *United States*, 180 U. S. 356, 361, 45 L. Ed. 570	15, 48
Brown v. *United States*, 35 App. D. C.	15, 45
Colbert v. *United States*, 79 U. S. App. D. C. 261, 146 F. 2d 10, 12	16, 49
Den v. *The Hoboken Land and Improvement Co.*, 18 How., 272, 15 L. Ed. 372, 374	51
Dickerson v. *United States*, 18 F. 2d 893	38
Ex parte Atkinson, 84 F. Supp. 300, 304	14, 29
Hendrey v. *United States*, 233 F. 5	50
Hill v. *North River Ins. Co.*, 111 Kan. 225, 207 P. —, 24 A.L.R. 736, 738	14, 31
Hite v. *United States*, 168 F. 2d 973, 974, 975	13, 28

Page

Illinois Auto Ins. Exch. v. *Southern Motor Sales Co.*, 207 Ala. 265, 97 So. 429 ..... 14, 31
Improvement Co. v. *Munson*, 14 Wall. 442, 447, 20 L. Ed. 867 36
In re: Bonner, 151 U. S. 242, 35 L. Ed. 149, 151 .....
Isbell v. *United States*, 227 F. 788 36
Kenion v. *Gill*, 81 U. S. App. D. C. 96, 155 F. 2d 176 .. 15, 45
Loney v. *United States*, 151 F. 2d 1, 4 ..... 13, 28
McAfee v. *United States*, 105 F. 2d 21, 26, 27, 30, 70 App. D.C. 142 ..... 15, 48
Morris v. *United States*, 156 F. 2d 525 ..... 15, 46
Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333, 77 L. Ed. 819 37
People v. *Ranney*, 213 Cal. 70, 1 P. 2d 423 ..... 16, 45
Sleight v. *United States*, 65 App. D. C. 203, 82 F. 2d 459 35
The Schooner Hoppet and Cargo v. *United States*, 7 Cranch 389, 394, 3 L. Ed. 380 33
Thomas v. *United States*, 151 F. 2d 183, 186 ..... 15, 49
United States v. *Mangus*, 33 F. Supp. 596 ..... 14, 30
United States v. *Patton*, 120 F. 2d 73, 75, 76 ..... 13, 24
United States v. *Gavin*, 71 F. Supp. 545 35
United States v. *Weitzel*, 246 U. S. 533, 62 L. Ed. 872, 875 .....
Williams v. *United States*, 76 U. S. App. D. C. 299, 131 F. 2d 21 ..... 15, 45

TEXTS CITED

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32 Am. Jur. pp. 892, 893, sec. 7 ..... 14, 32
Bishop, Criminal Law, Vol. 2, p. 616, sec. 808 (2) 33

District of Columbia Code, 1940 Edition:

Title 22, section 2201 ..... 12, 15, 44

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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ALBERT F. GRAHAM,
Petitioner and Appellant below,

v.

THE UNITED STATES OF AMERICA,
Respondent and Appellee below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

Heretofore, petitioner and appellant below was criminally charged by the United States, as follows:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term, January Term, 1950

THE UNITED STATES OF AMERICA

v.

ALBERT F. GRAHAM

Criminal No. 585–'50

Grand Jury No. Orig.

Vio. Sec. 2201, Title 22, D. C. Code

(Grand Larceny)

The Grand Jury Charges:

On or about February 2, 1950, within the District of Columbia, Albert F. Graham, stole the property of Francisco Gal, of the value of about $100.00 consisting of the following: One hundred dollars in money.

Second Count:

On or about February 3, 1950, within the District of Columbia, Albert F. Graham stole the property of Francisco Gal of the value of about $1,900.00, consisting of the following: one thousand nine hundred dollars in money.

(S.) GEORGE MORRIS FAY,
Attorney of the United States in and for the District of Columbia.

A True Bill:
(S.) EDWARD J. ROCKEFELLER,
Foreman.

Thereafter, petitioner and appellant below, went to his trial, and on May 10, 1950, was found guilty as indicted. R. 4A.

Thereafter, and on May 29, 1950, the Trial Court imposed sentence in the cause as follows:

> It is Adjudged that the defendant is guilty and charged and convicted.
>
> It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of Six (6) Months to Eighteen (18) Months. R. 7A.

Thereafter, petitioner and appellant below filed his notice of appeal, R. 8A, and on December 28, 1950, the United States Court of Appeals for the District of Columbia Circuit, gave out its written Opinion affirming the conviction in the Trial Court. R. 78.

Factual Situation

Heretofore in May, 1950, appellant was charged in an indictment containing two counts, of grand larceny; and upon trial before a jury, was found guilty as charged.

The complaining witness was one Francisco Gal, an Hungarian immigrant in the United States of America since 1943, who had pending an application for United States citizenship.

The said Gal, first met appellant in the early part of 1950, at appellant's office, whence he had gone to confer with Attorney Evan Thomas Davis, then an associate of appellant.

Attorney Davis was then on a protracted absence from the office, and appellant inquired concerning the said Gal's business, and offered to assist him.

Thereupon the said Gal advised appellant that some time prior to his present call, he, the said Gal, has been

arrested; charged with Disorderly Conduct; and forfeited $25.00 collateral.

The said Gal further stated that this arrest troubled him sorely, for he feared that by reason of it his opportunity for acquiring United States citizenship would be greatly jeopardized—the gist of the offense aforesaid being a violation of the sex laws.

Thereupon, the following occurred, (Joint Appendix pp. 10A, 11A):

> Q. Continue with the conversation between you and Mr. Graham in his office.
>
> A. Yes, sir. Then I been ask him—I told him I were much worried because I had made my application for citizenship, so I wouldn't like to be in any trouble, and what can I do?
>
> And he said, "The best thing you can do—I tell you something. I can't tell. I have to talk to the policeman. You have to pay money for that, because the money is talk."
>
> Then I did ask, "What is? How much? Because I am working man. I have to work hard for my every penny. But I don't like to be in trouble, and I do what I can. If you think that is the best, if you can do it, what you can, I don't mind."
>
> Then I ask him how much money— First, I ask him how much is—he want for his service.
>
> Q. His fee?
>
> A. His fee. He charge me $200. He ask me how much I would pay for Mr. Davis. I told $200, and he be charge the same.
>
> Q. All right. What else was said?
>
> A. Then he said he talk to the police and go over and help me. I am not in trouble, but don't mention the money for nobody and for the police either.
>
> Q. He said, "Don't mention money to anybody"?
>
> A. Yes, sir; nobody.
>
> Q. Did he tell you how much money he wanted for the police?

A. Then he tell me $2,000.

Q. What did you say?

A. I said, "It is too much money, but I try to get the money if it is the way I can do it, because I don't know about—what is it?—the trouble I am in—what I have to do, because I know not what the law is in the United States." I do everything he advise me.

This part of the transaction occurred February 2, 1950. And on this day the complaining witness gave appellant the sum of $300.00.

On February 3, 1950, the complaining witness again came to appellant's office with $1,900.00.

At (Joint Appendix pp. 13A, 14A) we learn of the events of that day:

Q. Tell the jury just what happened and what you did when you got to Mr. Graham's office that time.

A. Then Mr. Graham was not in at his office. The young lady, his secretary, was there, sitting at the phone. Then I sat down in the waiting room for a few minutes until Mr. Graham came. Then I walked into his office and he shut the door.

• • • • • • •

A. Then he asked me, "Did you get the money?" I said, "Yes, I did."

He said, "Then, just sit down, and the police officer will be here."

Q. Pardon me. Not quite so fast. He said what?

A. He said, "Sit down and make you comfortable, and the police officer will be here."

Exactly that is correct.

"But don't show any upset or any worry. Just sit down quietly, and he go to talk to you."

Q. He said, "Don't show any upset"? Do you mean excitement?

A. That is it, yes, sir. I am sorry; I can't express myself correctly. Just however I can. I try.

• • • • • • •

A. Yes. It wasn't must more conversation. When he asked me the money, and I asked about Mr. Davis again, I said, "Mr. Davis is a very nice man," and he said, "Well, just the same; me or Mr. Davis. Mr. Davis work for me."

* * * * * * *

A. The police officer came there 12 noon.

Q. What police officer was that?

A. The one which is arrested me on January 12, that night.

* * * * * * *

Q. Will you tell everything that was said and done by you and by Mr. Graham and by Mr. Williams, when Mr. Williams (the police officer) came?

A. Mr. Graham, when Mr. Williams come, he went out and left the office for a few minutes, and Williams, the officer, just stayed a few minutes, and he told me, "I told you you aren't in trouble, and I am not putting you in trouble. This was over that night when you paid $25. This is not trouble at all," and he shook hand with me, and I shake hands with him for his kindness, to make me feel better.

Q. Did Officer Williams then leave?

A. Then he left. Then Mr. Graham came in, and he said, "Now, what did the officer tell you?" And I said.

He said, "I told you he is very nice." He said, "See how easy? That is what I told him. Money is talk." He told me again.

Q. What did you do?

A. Then I put out the nineteen hundred dollar on his desk.

Q. What did he say.

A. He didn't say anything. After, he said, "Well, it is all right," and give me his card.

Q. Did he give you any receipt for that money?

A. No, not for the nineteen hundred dollar, * * *."

On cross examination it was developed that in 1948, the complaining witness was arrested on a charge of in-

decent assault; paid Attorney Davis $200; the case was dropped; and that in executing his application for citizenship papers, the complaining witness stated that he had never been arrested.

This false statement was the bete noir underlying the fear that drove him to seek legal assistance on February 2, 1950.

At (Joint Appendix) p. 31A, we read:

> Q. After finding out from the police officer that the case was closed and that it was not going to be reopened, you then gave Mr. Graham $1,900?
> A. Yes, sir.

Thereafter, Lewis Tillmon Williams, the police officer heretofore mentioned, testifying as a government witness, stated that he had no financial dealing with appellant and did not receive anything from appellant.

Thereafter, there was introduced into evidence as part of the government's case a statement executed by appellant before a police officer, and which concerned this matter, which adds nothing to the case one way or the other.

Thereupon the government rested, and counsel for appellant made a motion for acquittal, and the following colloquy occurred at the bench, (Joint Appendix, p. 43):

> The Court: I do not know. Frankly, I am very doubtful on this question as to what the law is. In other words, the only ground for conviction here would be larceny by trick.
> Mr. Patton: Yes, sir.
> Mr. Goldstein: Yes, sir. * * * It would have to be larceny by trick.
> The Court: That is the only one.
> Mr. Goldstein: I have some authorities on that.
> The Court: In other words, if it is embezzlement, there is no case to go to the jury.

Mr. Patton: That is right.

The Court: Or if it is larceny after trust, it cannot go to the jury.

Mr. Patton: That is right.

The Court: It can only be larceny by trick.

Thereafter counsel for appellant made his motion for acquittal, arguing in effect, that the evidence did not support a charge of larceny, since the complaining witness had parted with both possession and title.

The Court denied this motion, thusly: (Joint Appendix, p. 44)

> The Court: I think if at the time he takes it he has intent then to convert it, then he has only custody. I think the case will have to go to the jury, Mr. Goldstein.

Thereafter appeliant called a number of character witnesses, and then took the stand in his own behalf. He testified that he had received the sums mentioned by the complaining witness; that he had paid nothing to any police officer; that he kept and banked the money he received for his services in the cause.

Thereupon the counsel for the parties rested.

At (Joint Appendix, p. 60) this occurred:

> The Court: (Addressing Mr. Patton) I think * * * I should emphasize the fact the felonious intent must exist at the time of the reception of the property.

And at (Joint Appendix, p. 61):

> The court: * * * I will more particularly specify that any felonious intent to convert must exist at the time of reception of the property.

And at (Joint Appendix, p. 61):

> The Court: * * * I will charge, if you wish me to, that if at the time he received this property he in-

tended feloniously to convert it to his own use, without the consent of the owner, then he acquired only custody and not possession, and then improper use of it would be larceny.

Mr. Goldstein: In this situation, where the question of the nature of the consent is involved, the intention of the owner is also involved, and if he gave it to the defendant, intending that he be able to pass title to it, then, I submit, under those circumstances it would not be larceny.

The Court: If anybody could explain to me how you can define "intent to pass title"—frankly, I do not understand it.

Thereupon the Court instructed the jury, in part as follows: (Joint Appendix, pp. 74-77)

The Court: (Bailey, J.): Members of the jury: The defendant, * * * has been charged by the United States in an indictment containing two counts, the first of which charges him with stealing the sum of $100 from one Francisco Gal; the second count charging that he stole the sum of $1,900 from the same Francisco Gal.

Now, the charge of stealing or the charge of theft ordinarily means the taking of personal property with intent at that time to convert it to the use of the thief—that is, taking it surreptitiously or secretly for the purpose of converting it to the use of the party stealing it.

In this case, the form of theft charged—or, rather, the contention that the government makes at this particular trial—is the gaining of personal property from the owner by trick or fraud. If that is done—if possession is gained by trick or fraud—the law treats possession as not being transferred but remaining in the owner, and therefore the crime is larceny. That is, if a person by trick or fraud obtains the property of another with the intent to convert it to his own use, that would be larceny; and if the de-

fendant was guilty o. that in this case, he would be guilty under this indictment.

It is necessary, however, in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained there must be the fraudulent intent at that particular time of the party taking it to convert it to his own use. It he takes it without that intent—if he takes it for the purpose of carrying out any agreement or arrangement and afterward converts it to his own use —that would not be larceny.

The question here is, did the defendant acquire this property by trick or fraud, and at the time intend to convert it to his own use, and did later convert it to his own use? If there was any arrangement between the parties by which this money was to be used to bribe or pay the police, and at the time the money was transferred to the defendant he then intended not to use it under that agreement, but to use it for his own use, then he would be guilty under this indictment.

It is for you to determine, first, Was there any arrangement between the parties—between the complaining witness and the defendant—by which this money was to be used to bribe or pay the police? If it was intended as a fee for services that had been rendered or were to be rendered, then there is no larceny at all in the case and no criminal charge in it. The question is, Was there an arrangement of that nature? And if so, did the defendant, at the time he received this money, intend not to carry out that arrangement but to convert it to his own use? If he did, then he would be guilty. But, as I said before, if there was no such agreement, or if the money was paid as a fee either for services that had been rendered or were to be rendered, then the defendant is not guilty under this charge, and there would be no criminal offense at all.

• • • the Government must prove all the material facts necessary to his guilt beyond a reasonable doubt, • • •. But if you have any reasonable doubt of the facts and elements necessary to constitute the offense with which the defendant is charged, your verdict should be not guilty.

• • • •

Taking all these things into consideration, determine whether or not the Government has proved beyond a reasonable doubt that the defendant acquired one or both of these sums by fraud or trick, with the intent at that particular time to convert them to his own use. If he did, he is guilty. But if he did not, or if you have any reasonable doubt as to whether he did or did not, your verdict should be, Not guilty.

• • • •

(At the bench):

Mr. Goldstein: I only wish to repeat the point we made on our motion for a directed verdict, Your Honor, and except to that portion of Your Honor's charge in which you stated that where a person obtains the property of another by trick or fraud, it is larceny. Our position is that only where he obtains custody as distinguished from possession, is it larceny.

The Court: Sometime I will ask you to explain to me that difference.

Mr. Goldstein: I hope Your Honor will not.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the provisions of Title 28, section 1254, U. S. C.

Question Presented

I

The indictment in the Trial Court charged violation of Title 22, Section 2201, of the District of Columbia Code, 1940 Edition, which reads as follows:

> 22-2201 (6:60). Grand Larceny.
>
> Whoever shall feloniously take and carry away anything of value of the amount or value of $50 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, sec. 826; Aug. 12, 1937, 50 Stat. 628, ch. 599.)

Grand Larceny is not defined in the District of Columbia Code, nor by the United States Criminal Code.

Ergo, the statute using a term known to the common law to designate a common law offense—without defining the term—courts called upon to construe the term should use the common law meaning.

> *Where the evidence adduced in the trial court conclusively establishes that thereunder, the offense—if any—committed was that of Common Law Cheat; is fatal and prejudicial error committed in submitting the case to a jury upon a charge of Larceny By Trick? Is a resulting Verdict of Guilty As Charged, and a subsequent Judgment and Sentence, illegal and void?*

II

> *Where upon a trial of the indictment returned in this case—charging grand larceny—the evidence adduced positively establishes that the complaining-witness-victim, voluntarily parted with both title and possession of the money in question, is it fatal and prejudicial error to submit the case to the jury? The petitioner and appellant below having moved the Trial Court for a directed verdict in his favor.*

III

Where upon a trial of the indictment returned in this case—charging grand larceny—the Trial Court in submitting the case to the jury fails and neglects to fully and adequately instruct the jury,

(a) As to the definition of the offense;
(b) As to the essential elements of the offense; and
(c) As to the defendant's theory of defense—supported by substantial evidence;

is a resulting verdict of guilty, judgment of guilty, and sentence illegal and void?

IV

Is a conviction, under the circumstances outlined supra, contrary to the evidence, contrary to the law of the case, and in violation of the Constitutional guarantee of a fair trial under due process of law?

Reasons Relied On for the Allowance of the Writ

1. The decision of the Court below is in direct conflict with the decisions of at least two Circuit Courts of Appeal in holding that petitioner, appellant below, was guilty of grand larceny.

There can be no larceny where the owner of property voluntarily parts with both possession and title, voluntarily.

Decisions of Circuits

C. C. A. 3.
United States v. *Patton*, 120 F 2d 73, 75, 76. (1941).

C. C. A. 10.
Loney v. *United States*, 151 F 2d 1, 4. (1945).
Hite v. *United States*, 168 F 2d 973, 974, 975. (1948).

2. The decision of the Court below has decided an important question of federal law, i.e.,

(a) What constitutes grand larceny in a criminal prosecution brought in the name of the United States; and

(b) What constitutes legally sufficient instruction to a jury deliberating upon such a charge prosecuted by the United States;

which questions have not been, but should be, settled by this court.

It is believed that where an Act of Congress denounces an act as a Crime; fails to define the offense denounced; and different Circuit Courts of Appeal, interpret the law of the case in conflicting adjudications, an authoritative and final adjudication by this Court is required to settle the law.

3. The decision of the Court below has decided an important question of general law in a way untenable and in conflict with the weight of authority.

See, cases cited *supra* under 1, of Reasons Relied On for the Allowance of the Writ; and

Ex parte Atkinson, 84 F. Supp. 300, 304. D. C., E. D., S. C. 1949.

United States v. *Mangus*, D. C., Ind. 33 F. Supp. 596.

Illinois Auto. Ins. Exch. v. *Southern Motor Sales Co.*, 207 Ala. 265, 92 So. 429, 24 A. L. R. 734, 735.

Hill v. *North River Ins. Co.*, 111 Kan. 225, 207 Pac. 24 A. L. R. 736, 738.

32 Am. Jur. pp. 892, 893, sec. 7.

32 Am. Jur. pp. 918, 919, sec. 30.

36 C. J. p. 760, sec. 93.

4. The decision of the Court below has decided an important question of federal law which has not been, but

should be, settled by this court, and in so doing, the Court below has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Trial Court, as to call for an exercise of this Court's power of supervision.

Itemizing, it is contended:

(a) The Trial Court never instructed the jury the taking must be felonious—in fact never thought to use the term "felonious" or to define it;

(b) The Trial Court did not fully and adequately charge the jury as to the elements of the offense;

(c) The Trial Court did not in any manner instruct or attempt to instruct the jury as to the law covering defendant's theory of the case, notwithstanding there was evidence to support defendant's theory,—this relating to the question of voluntary parting of both title and possession.

See, District of Columbia Code, 1940 Ed., Title 22-2201;

Whoever shall *feloniously* take and carry away * * *; and

Brotherhood of Carpenters v. *United States,* 330 U. S. 395, 407, 409, 410, 411, 412, 91 L. Ed. 985, 67 S. Ct. 782.

Bird v. *United States,* 180 U. S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570, 573.

Brown v. *United States,* 35 App. D. C. 548, 522.

Kenion v. *Gill,* 81 U. S. App. D. C. 96.

Williams v. *United States,* 76 U. S. App. D. C. 299.

Morris v. *United States,* 156 F. 2d 525.

McAfee v. *United States,* 105 F. 2d 21, 26, 27, 30, 70 App. D. C. 142.

Thomas v. *United States,* 151 F. 2d 183, 186.

Colbert v. *United States*, 79 U. S. App. D. C. 261, 146 F. 2d 10, 12.

People v. *Ranney*, 213 Cal. 70, 1 P. 2d 423.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court issue, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the District of Columbia Circuit had in the case numbered and entitled on its docket, No. 10,666, Albert F. Graham, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the District of Columbia Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated: February 26, 1951.

T. Emmett McKenzie,
Counsel for Petitioner,

and

Kenneth D. Wood,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 580

ALBERT F. GRAHAM,
Petitioner and Appellant below,

v.

THE UNITED STATES OF AMERICA,
Respondent and Appellee below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears at R. 78.

The Trial Court issued no formal opinion.

Jurisdiction

1. The date of the judgment to be reviewed is December 28, 1950.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28, section 1254, U.S.C.

Statement of the Case

This has already been stated in the preceding petition under Summary Statement of the Matters Involved, which is hereby adopted and made a part of this brief, in the interest of brevity.

Specification of Errors

Each court below erred in holding that petitioner and appellant below was guilty of the criminal offense of Grand Larceny under the evidence adduced.

2. Each court below erred in holding that under the evidence adduced a motion for verdict of acquittal might be legally denied.

3. Each court below erred in holding that the Trial Court had adequately and fully instructed the jury with respect to:

(a) The legal definition of the offense charged;

(b) The legal essential elements of the offense charged;

(c) The defendant's theory of the defense, this element being supported by substantial evidence.

4. In so doing, each court below, denied petitioner and appellant below the Constitutional guarantee of a fair trial under due process of law as guaranteed in Constitution of the United States, Amendment V.

ARGUMENT

Summary of the Argument

Point A. Under the indictment, petitioner and appellant below was charged with a criminal offense, the which is not defined in the Act of Congress denouncing the conduct made criminal.

Therefore, resort must be had to the common law definition of the offense, and under the common law, the conduct

revealed by the evidence in the Trial Court, amounted to, and only, the offense of Cheat—a misdemeanor; and not the offense of Grand Larceny.

Point B. When, at the conclusion of the evidence, petitioner and appellant below, moved the Trial Court for a Verdict of Acquittal for insufficiency of evidence, it was error to deny the motion and to submit the case to the jury; all the evidence showing that the offense charged had not been committed.

Point C. When, in instructing the jury, withal trial counsel requested specific requests for instructions, the Trial Court submitted the case to the jury without first

1. Instructing the jury completely and fully as to the definition of the offense charged;
2. Instructing the jury completely and fully as to the legally essential elements of the offense charged;
3. Instructing the jury completely and fully as to the elements and effect of petitioner and appellant's below theory of defense, this element of the case being supported by substantial evidence;

the Trial Court below committed fatal and prejudicial error.

Point D. The Trial Court thus denied appellant below a fair trial under process of law; and the Appellate Court below in approving the conduct of the Trial Court below likewise denied petitioner and appellant below his Constitutional right to a fair trial under due process of law, as guaranteed by Amendment V., to the Constitution of the United States.

Point A

The criminal offense charged was not established by the evidence which proved—if anything criminal—the common law misdemeanor of "Cheat"; wherefore no offense against the United States was committed.

The genesis of the transactions which gave rise to the aforesaid prosecution resulted from a visit the complaining witness made to petitioner's and appellant's below office in search of an associate of the latter, who was then on a protracted absence.

The complaining witness asserted that at a prior time he had been arrested; that this arrest troubled him greatly, in that he feared it might jeopardize his acquisition of United States citizenship—the particular offense being a violation of the sex laws of the District of Columbia.

The testimony adduced in the lower court as set forth in Joint Appendix, below, pp. 10A and 11A, fills out the transaction, thus: (Direct examination).

> Q. Continue with the conversation between you and Mr. Graham in his office.
>
> A. Yes, sir. Then I been ask him—I told him I were much worried because I had made my application for citizenship, so I wouldn't like to be in any trouble, and what can I do?
>
> And he said, "The best thing you can do—I tell you something. I can't tell. I have to talk to the policeman. You have to pay money for that, because the money is talk."
>
> Then I did ask, "What is? How much? Because I am working man. I have to work hard for my every penny. But I don't like to be in trouble, and I do what I can. If you think that is the best, if you can do it, what you can, I don't mind."
>
> Then I ask him how much money—First, I ask him much is—he want for his services.

Q. His fee?

A. His fee. He charge me $200. He ask me how much I would pay for Mr. Davis. I told him $200, and he be charge the same.

Q. All right. What else was said?

A. Then he said he talk to the police and go over and help me. I am not in trouble, but don't mention the money for nobody and for the police either.

Q. He said, "Don't mention money to anybody?"

A. Yes, sir; nobody.

Q. Did he tell you how much money he wanted for the police?

A. Then he tell me $2,000.

Q. What did you say?

A. I said, "It is too much money, but I try to get the money if it is the way I can do it, because I don't know about—what is it?—the trouble I am in—what I have to do, because I know not what the law is in the United States." I do everything he advise me.

This part of the transaction occurred February 2, 1950. On this day the complaining witness gave appellant $300.00.

At Joint Appendix pp. 13A, 14A, the testimonial narration continues; re: February 3 and delivery of $1,900.00.

Q. Tell the jury just what happened and what you did when you got to Mr. Graham's office that time.

A. Then Mr. Graham was not in at his office. The young lady, his secretary, was there, sitting at the phone. Then I sat down in the waiting room for a few minutes until Mr. Graham came. Then I walked into his office and he shut the door.

• • • •

A. Then he asked me, "Did you get the money?" I said, "Yes, I did."

He said, "Then, just sit down and the police officer will be here."

Q. Pardon me. Not quite so fast. He said what?

A. He said, "Sit down and make you comfortable, and the police officer will be here."

Exactly that is correct.

"But don't show any upset or any worry. Just sit down quietly, and he go to talk to you."

Q. He said, "Don't show any upset?" Do you mean excitement?

A. That is it, yes, sir.

• • • •

A. Yes. It wasn't much more conversation. When he asked me the money, and I asked him about Mr. Davis again, I said, "Mr. Davis is a very nice man," and he said, "Well, just the same; me or Mr. Davis. Mr. Davis he work for me."

• • • •

A. The police officer came there 12 noon.

Q. What police officer was that?

A. The one which is arrested me on January 12, that night.

• • • •

Q. Will you tell everything that was said and done by you and by Mr. Graham and by Mr. Williams, when Mr. Williams (the police officer) came?

A. Mr. Graham, when Mr. Williams come, he went out and left the office for a few minutes, and Williams, the officer, just stayed a few minutes, and he told me, "I told you you aren't in trouble, and I am not putting you in trouble. This was over that night when you paid $25. This is not trouble at all," and he shook hand with me, and I shake hands with him for his kindness, to make me feel better.

Q. Did Officer Williams then leave?

A. Then he left. Then Mr. Graham came in, and he said, "Now, what did the officer tell you?" And I said.

He said, "I told you he is very nice." He said, "See how easy? That is what I told him. Money is talk." He told me again.

Q. What did you do?

A. Then I put out the nineteen hundred dollar on his desk.

Q. What did he say?

A. He didn't say anything. After, he said, "Well, it is all right," and give me his card.

Q. Did he give you any receipt for that money?

A. No, not for the nineteen hundred dollar * * *.

* * * *

At Joint Appendix p. 31A:

Q. After finding out from the police officer that the case was closed and that it was not going to be reopened, you then gave Mr. Graham $1,900?

A. Yes sir.

Thereafter Officer Williams testified he was never concerned in the transaction financially.

Thereafter petitioner and appellant below testified that he received the sum of money in question; that he did not pay any money to a police officer; and that the money was a fee for services rendered.

The United States Court of Appeals for the District of Columbia Circuit, states on p. 2 of its opinion:

> In classic terminology, "the distinction drawn by the common law is between the case of one who gives up possession of a chattel for a special purpose to another who by converting it to his own use is held to have committed a trespass, and the case of one who, although induced by fraud or trick, nevertheless actually intends that title to the chattel shall pass to the wrongdoer." * * *.

It is contended that the evidence adduced in this case establishes that the complaining witness did actually and definitely pass title to the money to the petitioner and appellant below. That the purpose of payment was to extricate the complaining witness from his possible troubles

which had him "much worried". That payment was made *after* the object sought by him had been actually, and to his knowledge, accomplished. That at the time of payment no special purpose did, or could, exist, in the light of the reported testimony.

In this state of case, the trial Court being experienced and learned in the law, is presumed and required to know that the crime alleged is not supported by the evidence adduced. That the salient point is the delivery of both possession and title.

United States v. *Patton,* 120 F. 2d 73, 75, 76. (C. C. A. 3-1941).

> (1) * * * Nowhere in the statute is the word "larceny" defined. It is, however, well settled that when a federal statute uses a term known to the common law to designate a common law offense and does not define that term, courts called upon to construe it should apply the common law meaning. United States v. Palmer, 3 Wheat 610, 16 U. S. 610, 4 L. Ed. 471; United States v. Armstrong, Fed. Cas. No. 14, 467, 2 Curt. 446; United States v. Outerbridge, Fed. Cas. No. 15, 978, 5 Sawy. 620; United States v. Coppersmith, C. C. 4 F. 198; United States v. Clark, D. C., 46 F. 633.
>
> (2, 3) "Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein." Clark's Cr. Law (3d Ed.) 305. One of the essential elements of the crime is that the taking is by trespass, that is, without the consent of the owner. So in Reg. v. Ashwell, 16 A. B. D. 190, A. L. Smith J. said (p. 195): "To constitute the crime of larceny by common law, in my judgment, there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of

the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivering of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law."

In Hawkins' Plea of the Crown Vol. 1, Curwood's Ed. p. 142, it is said: "It is to be observed, that all felony includes trespass; and that every indictment of larceny must have the words felonice cepit, as well as asportavit; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away."

That the defendant in the present case did not take the money from the bank teller against his will is indisputed. The fact that his consent was obtained by means of fraud and forgery is relied upon by the government to sustain its position that there was in fact no consent. On this point the opinion of Chief Justice Tilghman, speaking for the Supreme Court of Pennsylvania, in Lewer 1. Commonwealth, 15 Serg. and R. 93, is so apt that we quote pertinent portions thereof. He said (15 Serg. and R. 96):

"It is of the essence of larceny, that the taking be invita domina, without the will of the owner. Fost. 123; 4 BL. Com. 230; 2 Cost, C. L. 665. The ancient known definition of larceny, says Foster, is fraudulenta, obtrectatio vei dlienae invita domina. Fost. 124. The question is, then, whether the defendant took and carried away the goods of the prosecutors, against their will? To a person unacquainted with legal subtleties, it would seem strange, to make it a question, whether, after a sale and delivering of goods, and a receipt given for the price of them, the vendee could be said to take them away against the will of the vendor? The argument on behalf of the prosecution is, that the consent of the venders was fraudulently obtained, and therefore, in law, it was no consent; and the defendant, having from the beginning an intent

to get possession of, and carry away, the property, without paying for it, was guilty of larceny."

The Chief Justice then examined the English Common Law authorities prior to 1776, which apparently sustained the prosecutor's argument. Concluding that they were all cases in which the consent was held to be void because the owner of the goods had no intent to part with the property, but only the possession for a particular purpose, he continued (15 Serg. and R. page 98):

(4) *"But when the owner intended to part with the property, the case is different. For although fraudulent means may have been used to induce him to part with it, yet he delivered the possession absolutely, and the purchaser received the possession, for the express purpose of doing with the goods what he pleased. The owner was not deceived in the manner in which possession was taken; it was his intent that the possession should never return to him; therefore, it was a case of cheat, and not of felony.* I find it laid down by East, a writer of criminal law of respectable character, "that if the owner parts with the property, by whatever fraudulent means he was induced to give credit, it is not felony. I have seen no judicial decision, which is authority in this court, carrying the doctrine of what may be called constructive larceny, beyond the case where possession only was intended to be so delivered."

The distinction here made by Chief Justice Tilghman between the case where the owner parts with possession of the personal property to be disposed of in accordance with his directions and where the owner intends to and does part with his title to the property has been made many times by text writers and by American as well as English cases at common law. (Citing, 2 Bishop's Cr. Law (9th Ed.) p. 616; Clark's Cr. Law (Mikell's 3rd Ed.) p. 322: "The law, however, makes a distinction where the owner intends to part with the 'property' or ownership, as

well as the possession. Where the owner of goods delivers possession to the accused, intending to part absolutely with the ownership, there can be no larceny, whatever may be the intent of the taker; for, the owner having parted with the title to the goods to the accused, any conversion by the accused is not a conversion of the goods of another! The fact that the possession is obtained fraudulently, and with intent to appropriate the goods, is altogether immaterial. Thus, a person who by false and fraudulent representations, induces another to give him a thing, or to sell and deliver goods on credit, does not commit larceny."

And—Welsh v. People, 17 Ill. 339, Ross v. People, 5 Hill, N. Y. 294; Kellogg v. State, 26 Ohio St. 15. And—Rex v. Jackson, 1 Moody, C. C. 119, 168 Eng. Repr. 1208; The Queen v. Joseph Barnes, 2 Den. 51, 169 Eng. Repr. 417; Regina v. Thomas, 9 Car. and P. 741, 173 Eng. Repr. 1033.

* * *

(5, 6) It will be seen that the distinction drawn by the common law is between the case of one who gives up possession of a chattel for a special purpose to another who by converting it to his own use is held to have committed a trespass, and the case of one who although induced by fraud or trick, nevertheless actually intends that title to the chattel shall pass to the wrongdoer. It may well be that the distinction is artificial and illogical and was evolved by judges in a humane search for legal methods for saving defendants from the consequences following conviction upon a charge of larceny which at the time many of the cases were decided was a capital offense. Commonwealth v. Eichelberger, supra. We are nevertheless here concerned solely with the question whether the government has proved facts which would sustain a conviction for larceny at common law. Our conclusion is that the facts would not sustain such a conviction.

The Tenth Circuit has so declared the rule to be, in a case, wherein that Court gave careful attention to the pertinent decisions of this Court, and differentiated the line of demarcation between similar but not identical circumstances, which tend to define as a larceny, that which is in fact and in law, the common law cheat.

Loney v. *United States,* 151 F. 2d 1, (C. C. A. 10-1945).

> (3) Where a person intending to steal another's personal property obtains possession of it, although by or with the consent of the owner, by means of fraud or through a fraudulent trick or device, and feloniously converts it pursuant to such intent, the owner will be regarded as having retained constructive possession. Hence, in such cases, the conversion constitutes a trespass (Citing, Beck v. United States, 62 App. D. C. 223, 66 F. 2d 203, 204; John v. United States, 65 App. D. C. 11, 79 F. 2d 136, 137. Bimbo v. United States, 65 App. D. C. 246, 82 F. 2d 852, 855; Talbert v. United States, 42 App. D. C. 1, * * *).
>
> (4) The foregoing rule is not applicable where the owner, although induced by fraud, intends to and does part voluntarily with his title to the property, not expecting the property to be returned to him or to be disposed of in accordance with his directions.

And that Court re-iterated the principle in a comparatively recent case, as follows:

Hite v. *United States,* 168 F. 2d 973, 974, 975. (C. C. A. 10—1948)

> (2) * * * We conclude, therefore, that we must look to the common law to ascertain the meaning of the word "stolen".
>
> (3) The word "steal" in a criminal statute ordinarily imports the common law offense of larceny.
>
> The evidence warranted a finding that the Hites secured possession of the Cadillac sedan from Stone through fraudulent misrepresentations, but the evidence clearly established that Stone voluntarily parted

with both title and possession of the automobile, not expecting it to be returned to him or disposed of in accordance with his directions.

The District Court for the Eastern District of South Carolina, held to the same effect, as follows:

Ex parte Atkinson, 84 F. Supp. 300, 304 (D. C., E. D. S. C.—1949)

> (4, 7) * * * One of the essential elements of the crime (meaning larceny) is that the taking must be without the consent of the owner. If the owner of personal property delivers it to another with the intention not only of parting with possession, but also of investing the person to whom it is delivered with the title to it, generally such person is not guilty of larceny in receiving it, even though the delivery was induced by fraud or misrepresentations.

In this Circuit, in *Atkinson* v. *United States, infra,* the Court clearly and plainly expresses the fundamental principle which distinguishes wrongful conversion by a *mere temporary custodian,* from wrongful conversion by one *clothed with some actual dominion and control over the property.*

Atkinson v. *United States,* 53 App. D. C. 277, 279, 289 Fed. 935.

> One Schiffern, desirous of selling a diamond ring was introduced to one Atkinson, defendant. Atkinson brought three other persons to Schiffern, one of whom produced $200—the asking price. It was suggested to Schiffern that he accompany the four, in a car, while they went for money; one of the four then having possession of the ring. Schiffern declined, the others, after striking him, fled with the ring in the automobile without having paid for the ring.
>
> Atkinson was indicted as a result, the indictment in two counts, charging violation of our present Title 22,

sec. 2201 (Grand Larceny), and our present Title 22, sec. 2203 (Larceny After Trust).

Atkinson was acquitted as to the grand larceny count, and convicted on the other, which read:

(1) "That if any person intrusted with the possession of anything of value, * * * for the purpose of applying the same for the use and benefit of the owner or person so delivering it, shall fraudulently convert the same to his own use, he shall * * * be punished," etc.

While this section has not been interpreted, we did say in Talbert v. U. S., 42 App. D. C. 1, 18, that "we fail to perceive any bearing it has upon the question of larceny by fraud or trick." Under the provisions of this section, the possession of property must be intrusted "for the purpose of applying the same for the use and benefit" if the person so intrusting it; that is the person to whom intrusted must be clothed with some actual dominion and control over the property for the purpose named. *Otherwise, he is a mere temporary custodian, and, if he wrongfully appropriates the property, he is guilty of larceny,* and not of the crime denounced by this section.

It is the rule, where property temporarily has been placed in the hands of another for a special limited purpose, that possession constructively remains with the owner while the other party has mere custody. The appropriation by the other party to his own use therefore, is larceny. U. S. v. Strong, 2 Cranch, C. C. 251, Fed. Cas. No. 16, 411; Talbert v. U. S., 42 App. D. C. 1, 16; Chaneck v. U. S., 50 App. D. C. 54, 267, Fed. 612, 11 A. L. R. 799.

In *United States* v. *Mangus,* (Indiana) 33 F. Supp. 596, the defendant contended that the crime of larceny is not committed for the reason that at the time the Pennville Bank cashed the checks presented by defendant and parted with its money, paying it over to defendant, it intended to part not only with the possession of the money, but with

the title and rights to the money, and therefore, the crime of larceny is not established.

> There is no doubt a very fine distinction between larceny by trick and obtaining money by falsely pretending that his tendered checks were good, but I am of the opinion that when the bank, without any representation from the defendant, cashed his checks, it believed the checks were good, and it parted with the possession and title to the money which it handed over to the defendant, and he, by converting it to his own use, is not guilty of larceny.

In *Illinois Auto. Ins. Exch.* v. *Southern Motor Sales Co.*, 207 Ala. 265, 92 So. 429, 24 A. L. R. 734, 735, the Court held:

> • • • Where the owner intends to transfer not the possession merely, but also the title to the property, although induced thereto by the fraud or fraudulent pretenses of the taker, the taking and carrying away do not constitute theft or larceny. Though the transaction is voidable at the election of the defrauded seller, the passing of the title to the chattel sold effects to prevent the act of the buyer from constituting theft or larceny of the goods of another. Kellogg v. State, 26, Ohio St. 15, 19, 2 Am. Crim. Rep. 96; 2 Bishop Crim. Law, 8th ed. pp. 475, 476; Black's Case, 83 Ala. 81, 83, 3 Am. Crim. Rep. 691, 3 So. 814; Lightman v. Boyd, 132 Ala. 618, 620, 32 So. 714; Butler v. State, 91 Ala. 87, 9 So. 191; Wilson's Case, 1 Port. (Ala.) 118; Wharton, Crim. Law, 11th Ed. sections 1126, 1206; Freeman's Notes in 57 Am. Dec. 278, 279, 285.

In Hill v. *North River Ins. Co.*, 111 Kan. 225, 207 Pac. 24 A. L. R. 736, 738, the Court stated:

> In 25 C. J. 657, the distinction is drawn between the closely allied crimes of obtaining property by false pretenses and larceny, but there supported by

many authorities, it is said: "The distinction between the crimes of obtaining by false pretenses and larceny lies in the intention with which the owner parts with the property. If the owner in parting with the property intends to invest the accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretense. But if the intention of the owner is to invest the accused with the mere possession of the property, and the latter, with the requisite intent, receives it and converts it to his own use, it is larceny."

In *32 Am. Jur. pp. 918, 919,* sec. *30,* vol. *32,* this rule is stated:

> • • • where the owner intends to, and does, part voluntarily with his title to the property as well as his possession thereof, to the alleged thief, not expecting the property to be returned to him or to be disposed of in accordance with his directions (there is no larceny). The well established rule that the taking in such case involves no trepass and that the taker is not guilty of larceny, applies even where the owner is induced to part with the title through the fraud and misrepresentation of the alleged thief.

Animadverting to 32 Am. Jur., we learn in sec. 7, pp. 892, 893, that:

> While the nature of larceny as a crime against possession and the general rule that a trespass is essential to the offense render the ordinary larceny readily distinguishable from one of obtaining property by false pretenses, which necessarily involves obtaining title through the perpetration of a fraud, the two offenses belong to the same family of crimes, and the distinction is less apparent where false pretenses is compared with larceny committed through obtaining possession by fraud. The distinction is a very nice one in many instances, and in some of the old English cases the difference is more artificial

than real, resting purely on technical grounds. *The character and nature of the crime depend on the intention of the parties. The intention of the owner not to part with his property when relinquishing possession is, in this class of cases, the gist and essence of the offense of larceny and the vital point on which the crime hinges and is to be determined. The correct distinction in cases of this kind seems to be that if by means of any trick, fraud, or artifice the owner of the property is induced to part with possession only, still meaning to retain the right of property, the taking by such means, where the requisite of felonious intent is present at the time, will amount to larceny; whereas, if the owner parts with not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but the crime of obtaining goods by false pretenses.*

The *Schooner Hoppet and Cargo*, v. *The United States*, 7 Cranch 389, 394, 11 U. S. 389, 394.

The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will satisfy the judgment to be pronounced.

At common law the offense of Larcency by Trick did not exist.

Bishop, Criminal Law, (9th Ed.) Vol. 2, p. 616, section 808 (2), provides this rule:

OWNERSHIP TO PASS—If, by fraud, a person is induced to part with his goods, intending to relinquish his property in them as well as his possession, he who thus obtains them *may be chargeable with a cheat at*

the common law or under the statute against false pretenses, yet not with larcency; * * *.

SAME, p. 105, sec. 143:

A cheat at common law is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest.

2. OLD STATUTE. * * * 33 Hen. 8, c. 1, section 1, 2, in effect affirmed the common law, adding little or nothing, and that is common law in this country.

144. THE LEADING DISTINCTION—not absolutely the only one, between this and our modern statutes against false pretenses is that while under the latter the cheat is sometimes indictable when brought about by a mere lie, it is otherwise of the common law cheat.

2. Under the ancient common law, and under this Statute of Hen. 8, there must be some symbol or token (such, for example, as the "counterfeit letters" mentioned in the statute) to give effect, character and credibility to the verbal falsehood. For *a fraud accomplished by a mere spoken lie is not at the common law indictable.*

145. MERE WORDS—are neither symbols nor tokens. Therefore a naked lie is not alone such a false symbol or token as causes the case to come within the law.

POINT B.

The Trial Court committed fatal and prejudicial error when it denied petitioner's and appellant's below Motion for Acquittal; and the United States Court of Appeals for the District of Columbia sanctioned that practice and procedure.

In the instant case, the "requisite evidence" which was indispensable to proof of the government's case was substantially this:

> Complaining witness, through fraudulent representation of appellant had parted with possession only, of

certain money, retaining constructive title pending the execution of certain instructions;

and this evidence not having been presented to the court and jury, presented a situation wherein there was nothing for the jury to consider—the government's case, as matter of law, not having been proved.

In *United States* v. *Gavin*, 71 F. Supp. 545, 549, the law is stated thus:

> (2) In Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720, which was a civil case, the Supreme Court in an opinion by Justice Butler stated:
>
> "'When, on the trial of the issues of fact, in an action at law before a Federal court and a jury, the evidence, with all the *inferences that justifiably could be drawn* from it, does not constitute a sufficient basis for a verdict for the plaintiff or defendant as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and *should* direct a verdict for the other party.' Slocum v. New York Life Insurance Co., 228 U. S. 364, 369, 33 S. Ct. 523, 525, 57 L. Ed. 879, (Ann. Cas. 1914D, 1029).
>
> "A mere *scintilla* of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is * * * literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Improvement Company v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867; Pleasants v. Fant, 22 Wall. 116, 122, 22 L. Ed. 780."

And the court in *Sleight* v. *United States*, 65 App. D. C. 203, 205, 82 F. 2d 459, says:

> Counsel for the government in their brief lay great stress upon the right of the jury to draw inferences

and deductions from the evidence; but *inferences* and deductions *which the jury may be permitted to draw must be based upon some substantial evidence* tending to establish the guilt of the defendant. *Otherwise* to permit the jury to convict upon inferences and deductions *would merely mean to permit the jury to speculate as to* the *guilt* of the defendant. *This sort of procedure the courts uniformly condemn.*

And the duty to determine whether a case may be permitted to go to the jury, is a legal duty, involving a determination of a legal question, devolving upon the trial court. That officer, supported by his expert knowledge of the law must weigh, consider and evaluate the evidence and then determine whether, in law, there is any case concerning which a jury may properly deliberate.

In *Isbell* v. *United States,* 227 Fed. 788, 790, the court said:

> At the close of the evidence in every trial by jury the *question of law,* not whether the weight of the evidence sustains the claims of the plaintiff or the defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff, necessarily and unavoidably arises, and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence. Brady v. Chicago G. W. Ry. Co., 114 F. 100, 105; Cole v. German Savings and Loan Soc., 124 F. 113, 121, 122; St. Louis Cordage Co. v. Miller, 126 F. 495, 508; Chicago Great Western Ry. Co. v. Roddy, 131 F. 712, 713; Western Union Tel. Co. v. Altvater, 149 F. 393, 397; Missouri Pac. Ry. Co. v. Oleson, 213 F. 329, 330.

Improvement Co. v. *Munson,* 14 Wall. 442, 447, 20 L. Ed. 867, says:

> It is clearly error in a court, said Taney, Ch. J., in United States v. Breitling, 20 How. 254, 15 L. Ed. 902, to charge a jury upon supposed or conjectural state of

> facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court; and if there be no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them in their deliberation. Goodman v. Simmons, 20 How. 395; 15 L. Ed. 928, * * *.

In the event this Court concludes that the evidence actually before the court below supported the inference that appellant had represented he required money for payment to the police, it appears that the same evidence equally well supported the inconsistent inference that he required money for payment for services rendered—the only available evidence being the conflicting testimony of appellant and of Gal.

In such a state of the case it was the duty of the court below to direct a verdict of acquittal.

In *Pennsylvania Railroad Co.* v. *Chamberlain,* 288 U. S. 333, 339, 340, 53 S. Ct. 391, 77 L. Ed. 819, the Supreme Court said:

> We, therefore, have a case belonging to that class of cases *where proven facts give equal support to each of two inconsistent inferences;* in which event, *neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences* as against the other, before he is entitled to recover. U. S. Fidelity and Guarantee Co. v. Des Moines Nat. Bank, 145 F. 273, 279, 280, and cases cited; Ewing v. Goode, 78 F. 442, 444; Louisville and N. R. Co. v. East Tennessee V. & G. Ry. Co., 60 F. 993, 999; Tucker Stevedoring Co. v. Gahagan, 6 F. 2d 407, 410; Blid v. Chicago and N. W. R. Co., 89 Neb. 689, 691, et seq.; (p. 340) 131 N. W. 1027; White v. Lehigh Valley R. Co., 330

N. Y. 131, 136; 115 N. E. 439; McGrath v. St. Louis Transit Co., 197 Mo. 97, 104, 94 S. W. 872; Quisenberry v. Metropolitan Street Ry. Co., 142 Mo. App. 275, 281, 126 S. W. 182; Glancy v. McKees Rocks Borough, 243 Pa. 216, 219; 89 Atl. 972. * * *.

The rule is succinctly stated in Smith v. First National Bank in Westfield, 99 Mass. 605, 606-612, quoted in the Des Moines National Bank case, supra:

"There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of these propositions against the other is necessarily wrong."

In *Dickerson* v. *United States,* 18 F. 2d 893, the Court applied this rule in criminal cases:

Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.

POINT C

The Trial Court's charge to the jury was fatally and prejudicially deficient, in that it neglected and failed:

1. To mention or define felonious intent;

2. To adequately define and explain the essential elements of the offense charged;

3. To mention, define or explain the elements of the trial defense theory.

The Trial Court's charge to the jury, sanctioned by the United States Court of Appeals for the District of Columbia Circuit, is as follows:

Charge to the Jury

The Court: (Bailey, J.): Members of the jury: The defendant, Albert W. Graham, has been charged by the United States in an indictment containing two counts, the first of which charges him with stealing the sum of $100 from one Francisco Gal; the second count charging that he stole the sum of $1,900 from the same Francisco Gal.

Now, the charge of stealing or the charge of theft ordinarily means the taking of personal property with intent at that time to convert it to the use of the thief—that is taking it surreptitiously or secretly for the purpose of converting it to the use of the party stealing it.

In this case, the form of theft charged—or rather, the contention that the Government makes at this particular trial—is the gaining of personal property from the owner by trick or fraud. If that is done—if possession is gained by trick or fraud—the law treats possession as not being transferred but remaining in the owner, and therefore the crime is larceny. That is, if a person by trick or fraud obtains the property of another with the intent to convert it to his own use, that would be larceny; and if the defendant was guilty of that in this case, he would be guilty under this indictment.

It is necessary, however, in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained there must be the fraudulent intent at that particular time of the party taking it to convert it to his own use. If he takes it without that intent—if he takes it for the purpose of carrying out

any agreement or arrangement and afterward converts it to his own use—that would not be larceny.

The question here is, Did the defendant acquire this property by trick or fraud, and at the time intend to convert it to his own use, and did later convert it to his own use? If there was any arrangement between the parties by which this money was to be used to bribe or pay the police, and at the time the money was transferred to the defendant he then intended not to use it under that agreement, but to use it for his own use, then he would be guilty under this indictment.

It is for you to determine, first, Was there any arrangement between the parties—between the complaining witness and the defendant—by which this money was to be used to bribe or pay the police? If it was intended as a fee for services that had been rendered or were to be rendered, then there is no larceny at all in the case and no criminal charge in it. The question is, Was there an arrangement of that nature? And if so, did the defendant, at the time he received this money, intend not to carry out that arrangement but to convert it to his own use? If he did, then he would be guilty. But, as I said before, if there was no such agreement, or if the money was paid as a fee either for services that had been rendered or were to be rendered, then the defendant is not guilty under this charge, and there would be no criminal offense at all.

These are the questions for you to determine, because you are the exclusive judges of the facts in the case. Any opinion I may state, either during the progress of the case or in my charge, as to any fact shown by the testimony, you are not to be controlled by. You are not to be controlled by my views at all as to the facts. That is for you, and you only, to decide. It is your duty to follow my instructions as to the law. But, as I said, the facts are your province, not mine.

You have heard the various witnesses. You have heard their testimony. You should consider the weight to be given the testimony of each witness. You should consider, in determining that, the appearance of the witness on the stand and the manner of the witness in testifying, whether the witness' answer was evasive, or whether he was frank and open. You should consider the interest that any witness may have in the result of this case for any reason, by reason of employment or friendship or as a defendant in the case, or for any reason that might tend, in your opinion, to bias or color the testimony of a witness. I do not mean by that that you are to disregard the testimony of a witness because he is interested, but you may take that into consideration in determining the weight of the testimony to be given that witness. If you find that any witness has willfully testified falsely as to any material fact as to which that witness could not reasonably be mistaken, you may disregard the testimony of that witness in whole or in part, as you deem fit.

The burden is upon the Government to prove the guilt of the defendant beyond a reasonable doubt. The defendant is presumed to be innocent, and that innocence attends him throughout the trial and until you have finally rendered your verdict. As I said, the Government must prove all the material facts necessary to his guilt beyond a reasonable doubt, and that is such a doubt as would cause one of you to pause and hesitate before taking some important step in life which you were not compelled to take. If you have no such reasonable doubt, of course, it is your duty to find the defendant guilty. But if you have any reasonable doubt of the facts and elements necessary to constitute the offense with which the defendant is charged, your verdict should be not guilty.

The defendant has offered testimony as to his good reputation, and that is a matter to be considered by you,

because that alone might be sufficient or may be sufficient to cause a reasonable doubt in your mind as to the guilt of the defendant.

Taking all these things into consideration, determine whether or not the Government has proved beyond a reasonable doubt that the defendant acquired one or both of these sums by fraud or trick, with the intent at that particular time to convert them to his own use. If he did, he is guilty. But if he did not, or if you have any reasonable doubt as to whether he did or did not, your verdict should be, Not guilty.

If counsel have any further requests or objections, step to the bench, and I will hear them.

(At the bench:)

Mr. Goldstein: I only wish to repeat the point we made on our motion for a directed verdict, Your Honor, and except to that portion of Your Honor's charge in which you stated that where a person obtains the property of another by trick or fraud, it is larceny. Our position is that only where he obtains custody as distinguished from the possession, is it larceny.

The Court: Sometime I will ask you to explain to me that difference.

• • • •

At an earlier stage of the cause—conclusion of the government's case—the Trial Court expressed difficulty in comprehending the nature of the legal question involved. Joint Appendix, pp. 43A, 44A.

> The Court: I do not know. Frankly, I am very doubtful on this question as to what the law is. In other words, the only ground for conviction here would be larceny by trick.

• • • • • • •

The Court: That is the only one.

• • • • • • •

The Court: In other words, if it is embezzlement, there is no case to go to the jury.

• • • • • • •

The Court: Or if it is larceny after trust, it cannot go to the jury.

• • • • • • •

The Court: It can only be larceny by trick.

• • • • • • •

The Court. I think if at the time he takes it he has intent to convert it, then he has only custody. I think the case will have to go to the jury, Mr. Goldstein.

At another juncture the Court conducting the trial of the cause was certain that an instruction as to felonious intent would be necessary. Joint Appendix, p. 60A.

The Court: • • • I think I should emphasize the fact that the felonious intent must exist at the time of the reception of the property.

And at Joint Appendix, p. 61A.

The Court: • • • I will more particularly specify that any felonious intent must exist at the time of reception of the property.

• • • • • • •

The Court: • • • it is the taking of property, with felonious intent at the time to convert it to his own use.

• • • • • • •

Mr. Goldstein: I think Your Honor should charge, in line with my argument on the motion for a directed verdict, that if he received it for the purpose of passing title, that would not be larceny. If he was author-

ized to pass title to the property, according to the Government's theory of the case, that would not be larceny.

The Court: I will not charge that in so many words. I will charge, if you wish me to, that if at the time he received this property he intended feloniously to convert it to his own use, without the consent of the owner, then he acquired only custody and not possession, and then improper use of it would be larceny.

Mr. Goldstein: In this situation, where the question of the nature of the consent is involved, and if he gave it to the defendant, intending that he be able to pass title to it, then, I submit, under those circumstances it would not be larceny.

The Court: If anybody could explain to me how you can define "intent to pass title"—frankly, I do not understand it.

It is earnestly contended that the matter cited clearly spells out:

(a) That the Court trying the cause knew it was absolutely essential to a legal charge to mention and explain "felonious taking"; but in some manner neglected and failed to so do.

(b) That this failure resulted in charging a jury to deliberate upon guilt in a state of case where a necessary element of the offense charged was to the jury totally unknown.

(c) That the Trial Court did not understand the doctrine of the Patton case, supra, and its companion cases, and flatly declined to charge as to the defendant's theory of the case.

Yet the Code section under which the prosecution was brought, District of Columbia Code, 1940 Edition, Title 22-2201, says, in part, as follows:

Whoever shall *feloniously* take and carry away anything of the value of $50, * * *.

And the United States Court of Appeals for the District of Columbia Circuit has said:

Brown v. *United States,* 35 App. D. C. 548, 552:

> (3) Larceny by the common law consists in the wrongful taking and carrying away of the chattels of another, with the *felonious* intent to convert them to the taker's own use. *These are the necessary elements of the offense* as defined in the Codes of the District of Virginia, and of North Caroiina.

In *People* v. *Ranney,* 213 Cal. 70, 1 P. 2d 423, the Court thus states the rule:

> * * * taking property which are unlawful but not criminal, the failure of the instruction in question to define "unlawful" as meaning "felonious", rendered it prejudicially erroneous.

Our Court of Appeals had had occasion in *Kenion* v. *Gill,* 81 U. S. App. D. C. 96, and *Williams* v. *United States* 76 U. S. App. D. C. 299, to comment on the failure of a trial judge to define offenses for which defendants were tried. In the case of *Kenion* v. *Gill,* 81 U. S. App. D. C. 96, the Court observed as follows:

> It is reversible error for the trial court to fail to define the various crimes involved in the indictment, and to fail to define the elements of each to the extent necessary to permit the jury to apply the law to the facts.

In *Williams* v. *United States,* 76 U. S. App. D. C. 299, the Court in discussing the trial court's charge, and the law of this jurisdiction with respect to instruction concerning the definition of offenses and of their elements, stated:

> A basic defect of the charges is the failure to discuss and define the offenses included within the indict-

ment. Rape was not defined generally, much less broken down into its constituent elements; naturally, as a result, the elements were not discussed or defined.

We have been proud that under our law the elements which go to make up a crime are definitely established.

The average man has some idea of what murder is, but we would not expect a judge to say, Jurors, you know what murder is, go and decide if this man is guilty of it.

To say that the jury, under proper instructions, might not have found defendant guilty or might not have inflicted the death penalty is not to interfere with its judgment. We merely insist that the judgment of a jury be informed and be made under the safeguards of correct procedure.

It can now be clearly seen that to hold this charge sound would be to assume that jurors are wise in the law; that they know the constituent elements of rape, that they know what is an assault with an intent to commit rape, that they know the full distinction between the two; that they know the definitions of the lesser offenses embraced; that they know all the circumstances under which a verdict of not guilty is proper. Such an assumption violates the accepted division of functions between judge and jury. It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?

In *Morris* v. *United States,* 156 Fed. 2d 525, the Circuit Court of Appeals said:

It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of

error was made at the trial covering this claimed error, but we consider it because, as is well stated in Suhay v. United States, 95 F. 2d 890, 893, "• • • Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form.

In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not.

The court did not define the offense of which the appellant was charged and was being tried, and the jury was given no opportunity of applying the facts to the law. Instead, the judge reserved to himself the duty of applying the law to the facts.

Where the instruction or charge of the court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instructions, otherwise he should explain it in other language in order that the jury may have a real understanding of the law before applying it to the facts. The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged.

It has been repeatedly stated that the jury are bound to take the law from the court as announced by it in the instruction, hence, we may conclude that a charge which fails to give any law but simply instructs a verdict upon proof of certain facts is bad. A jury may not justifiably find a verdict until they are instructed on the law, sufficiently to show them what is necessary for proof.

A perusal of the charge, in this case, in its entirety reveals the omission of any reference to the legal situation existing where from the evidence the jury have reasonable doubt as to whether possession and title passed; and similar failure to charge that in the event the evidence establishes that possession and title passed, the duty of the jury would be to acquit.

Yet from the evidence adduced and the representations made on behalf of appellant by his then counsel, it becomes immediately apparent that the law of the case required the jury to be fully informed as to that aspect of the trial.

The Supreme Court of the United States has succinctly and cogently expressed the doctrine.

In *Bird* v. *United States,* 180 U. S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570, 573, the Supreme Court said:

> It is well settled that the defendant has a right to a full statement of the law from the Court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 5, section 3162, 7th ed. *The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.*

Concerning the same principle this Court has spoken.

McAffee v. *U. S.,* 105 F. 2d 21, 26, 27, 30, 70 App. D. C. 142.

> (7, 8) • • • While some reliance may be placed by a trial judge upon the capacity of a jury to understand the implications of instructions, nevertheless *both of the parties to the cause are entitled to have the jury clearly informed on the whole of the instructions as to the law covering their respective theories of the case,* there being evidence to support each theory.
>
> • • • we think that the instructions so over-emphasized the question whether or not the confession was understood by the defendant that the other question, whether or not it was voluntary, must have been lost sight of by the jury. We conclude, therefore, that the jury must be said not to have passed upon

> the question of the voluntariness of the confession. Thus the defendant was deprived of the judgment of the jury upon that question, with the possible result that they might have disregarded the confession.
> * * *
>
> 14. * * * The jury is an untrained body and it is the duty of the court to make as clear as it is possible just what the law is.

And with this declaration of law the Sixth Circuit is in agreement.

Thomas v. *United States,* (C. C. A. 6), 151 F. 2d 183, 186.

> (2-5) * * * It is well settled that appellant had a right to a correct statement of the law from the court. It is of course the duty of the court to explain the law of the case to the jury. Bird v. United States, 180 U. S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570.

The importance of a proper discharge of this important duty and function of the trial Court has been recognized by this Court, and by the Supreme Court of the United States.

Colbert v. *United States,* 79 U. S. App. D. C. 261, 146 F. 2d 10, 12.

> (3) * * * where the judge elects to charge in his own language on all matters properly to be considered by the jury, the failure of a requested instruction to conform precisely to the law, should not relieve the court of the duty to charge accurately upon an important phase of the evidence. Much more is this true where, as here, the court announces its purpose so to do.

Brotherhood of Carpenters v. *United States,* 330 U. S. 395, 407, 409, 410, 411, 412, 91 L. Ed. 985, 67 S. C. 782.

> * * * requested instructions were refused and instead instructions were given that stated a different concept of law, * * *

> * * * A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents * * *. The error is aggravated by the failure to give the correct charge upon request. (Citing, Bird v. United States, 180 U. S. 356, 361). * * *
>
> * * * Congress * * * has specified the standards by which the liability * * * is to be determined. No matter how clear the evidence, they (meaning the defendants) are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction. It could not be said that the failure was harmless error. (Citing, Weiler v. United States, 323 U. S. 606, Bruno v. United States, 308 U. S. 287).
>
> * * * though the failure so to charge was not excepted to, we would not be precluded from entertaining the objection. (Citing, Webing v. United States, 163 U. S. 632, 658; Brasfield v. United States, 272 U. S. 448, 450; see also United States v. Atkinson, 297 U. S. 157, 160. And see Rules of the Supreme Court, Rule 27). The erroneous charge was on a vital phase of the case and affected the substantial rights of the defendants. We have the power to notice a "plain error" though it was not assigned or specified.

In the Sixth Circuit, *Hendry* v. *United States,* 233 F. 5, 18, 19, says:

> * * * but the *respondents in a criminal case,* no less than the parties in a civil case, are *entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may under-*

stand that theory and the essential rules applicable to it.

And where, as in this case, the defendant's theory of the case, supported by substantial evidence, constitutes an absolute defense to the charge asserted, this rule is vitally important, and its abnegation entails terrible consequences for the luckless defendant.

POINT D

The conduct and actions of each court below amounted to a denial of a fair trial under due process of law as guaranteed by Amendment V, to the Constitution of the United States.

In *Den* v. *The Hoboken Land and Improvement Co.*, 18 How. 272, 15 L. Ed. 372, 374, this Court said:

> The words "due process of law", were undoubtedly intended to convey the same meaning as the words "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says, they mean due process of law.

It is believed the statute under which the prosecution in this case proceeded, and the adjudicated cases interpreting the legal principles involved in this case, together constitute the "law of the land," with respect to the rights of a citizen charged by his government with a criminal offense.

It is contended that the trial of this case, and the opinion of the United States Court of Appeals for the District of Columbia Circuit, have each and both failed to recognize those applicable principles which constitute the "law of the land" here; and that accordingly the Constitutional guarantee has been denied petitioner and appellant below.

Conclusion

The petition to this Court, urging it to exercise its power to supervise the proceedings in the courts below; to decide the important question of federal and general law, which has not been, but ought to be, decided by this court; to clarify the conflicting opinions concerning the law of the case as existing in different circuits, is thought to present a matter deserving the attention of this court, to the end the existing perplexities and conflicts may be brought to an end and an authoritative rule of the case be made available to the people and their courts, and the existing doubts, confusions and uncertainties dispelled.

Respectfully submitted,

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(3305)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Fisher v. *United States*, 328 U. S. 463	6
Griffin v. *United States*, 336 U. S. 704	6

Statute:

Title 22, Section 2201 of the District of Columbia Code (1940 ed.)	2, 6
18 U.S.C. 2312, 2314	6

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 580

ALBERT F. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 78-81) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1950 (R. 82). On January 25, 1951, the time for filing a petition for a writ of certiorari was extended by order of the Chief Justice to February 26, 1951 (R. 83), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to go to the jury on the issue of whether petitioner committed the offense of grand larceny as defined by the District of Columbia Code.

2. Whether the trial court fully and adequately instructed the jury as to the elements of the crime charged and petitioner's defense thereto.

STATUTE INVOLVED

Title 22, Section 2201 of the District of Columbia Code (1940 ed.) provides:

> Grand Larceny.
>
> Whoever shall feloniously take and carry away anything of value of the amount or value of $50 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

STATEMENT

Petitioner was found guilty after a jury trial in the District Court for the District of Columbia under a two-count indictment charging him with grand larceny in having stolen money from one Francisco Gal on February 2 and February 3, 1950, in the amounts of $100 and $1,900, respectively (R. 3). He was sentenced generally to imprisonment for a term of 6 to 18 months (R. 7). On appeal to the Court of Appeals for the District of Columbia Circuit, his conviction was affirmed (R. 82).

Gal is an Hungarian immigrant (R. 8). On January 12, 1950, he was arrested for disorderly conduct and posted $25 collateral (R. 10), which he forfeited (R. 28). On February 2, 1950, fearful that this arrest would prejudice his application for citizenship, he went for advice to the office of a Mr. Davis, an attorney who had represented him before (R. 8, 10, 15).[1] Davis was absent from the office (R. 9, 48, 54), and petitioner, Davis' law partner, volunteered to take the case, stating that Davis worked for him (R. 13). Gal recounted the circumstances of his recent arrest and his fears as to the possible effect that it might have on his naturalization. Petitioner thereupon said: "* * * I have to talk to the policeman. You have to pay money for that, because the money is talk." Petitioner said that his own fee would be $200, the same as Gal had previously paid Davis, and that he wanted $2,000 to pay the police. Petitioner said he would talk to the police but warned Gal not to mention the money to anybody "and for the police either." (R. 11.) At that time Gal gave petitioner $300, of which $200 was in payment of the fee and $100 toward the payment to the police. Petitioner gave Gal a receipt for the $300. (R. 12.)

[1] In 1948 Gal was arrested on a criminal charge and Davis had represented him for a total fee of $200 (R. 19). In 1949, in connection with his naturalization proceeding, Gal failed to state the fact of this 1948 arrest in his petition, and on ascertaining his mistake he again retained Davis, who wrote a letter to the Immigration and Naturalization Service. Gal testified that for this service he paid Davis $200 in full payment of his fee. (R. 15-16, 31-32, 73-74.)

The next day, February 3, 1950, Gal went to the bank and withdrew $1,900 and took the cash to petitioner's office (R. 12). Officer Williams, who had arrested Gal on January 12, 1950, on the disorderly conduct charge, had been asked by petitioner the night before to come to his law office and tell him the circumstances of the arrest (R. 36). Williams testified that he went to petitioner's office and told him about the arrest, including the fact that Gal had forfeited $25 collateral in the case (R. 35-37). While the officer and petitioner were talking, Gal remained in another room (R. 30-31). Gal testified that petitioner then left his office to get a cup of coffee and that while petitioner was gone Williams told him, "I told you you aren't in trouble, and I am not putting you in trouble. This was over that night when you paid $25. This is not trouble at all." (R. 14.) Williams also told Gal that he "didn't have to worry" (R. 31). After Williams had left the office petitioner returned. Petitioner, after asking Gal what Williams had said, told Gal, "I told you he is very nice. See how easy? That is what I told him. Money is talk". (R. 14.) Gal then paid petitioner the $1,900 (R. 14, 29, 31), and again petitioner warned him, "Don't mention the money for nobody." Gal testified that no receipt was given him for this latter sum. (R. 14.)

Williams denied ever being offered or receiving any money from petitioner (R. 37), and petitioner denied giving him any (R. 42). Petitioner had the total $2,200 deposited in the joint bank account

he maintained with his wife (R. 55, 69). Four or five days after the second payment, petitioner made a payment of $2,000 on the mortgage on his own home (R. 55, 69).

Petitioner admitted (R. 50, 53) that he received the two payments of $300 and $1,900 from Gal and testified that he gave Gal a receipt for the $1,900 but kept no copy of it (R. 53-54). His defense was that the money was paid to him on account of a total fee of $2,500 for legal services rendered in connection with that part of the naturalization matter handled by his partner Davis and "everything growing out of it" (R. 47, 50).

ARGUMENT

1. Petitioner contends that the evidence adduced by the Government does not support a conviction of grand larceny as defined by the District of Columbia Code. His contention is based upon his view of the evidence as establishing that Gal intended to pass title to the money to him. He argues that where the owner intends to transfer title as well as possession of money or other property, the taking, even though induced by fraud or false pretenses, does not constitute larceny, and, hence, that, "if anything," the government proved only "the common law misdemeanor of cheat", with the result that the trial court should have sustained his motion for a judgment of acquittal. (Pet. 20-38.)

The difficulty with petitioner's contention is that the jury, under appropriate instructions (R. 74-

75), found against him on the issue of fact as to the arrangement between him and Gal. The Court of Appeals sustained the sufficiency of the evidence to support this finding, pointing out that "If the jury believed Gal's testimony, and did not believe that of the defendant, it was possible for the jury to conclude beyond a reasonable doubt that the defendant fraudulently induced Gal to give him $2,000 to be used for a special purpose, i.e., to bribe the police, that the defendant did not intend so to use the money, and converted it to his own use" (R. 79-80).

There is no more merit in petitioner's contention that the taking did not constitute larceny within the meaning of 22 D.C. Code 2201. For this involves a question of interpretation of local law and on such questions the decisions of the Court of Appeals are accorded finality by this Court, except in cases of conspicuous error. *Griffin* v. *United States,* 336 U. S. 704, 713-718; *Fisher* v. *United States,* 328 U.S. 463, 476-477. In this case, the Court of Appeals followed its own precedents, as well as state authorities, in holding "that 'one who obtains money from another upon the representation that he will perform certain service therewith for the latter, intending at the time to convert the money, and actually converting it, to his own use, is guilty of larceny' " (R. 79).[2]

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[2] Neither the state cases petitioner cites nor the federal cases involving the interpretation of the word "stolen" as used in the National Motor Vehicle Theft Act (18 U.S.C. 2312) and

2. Petitioner also objects that the charge to the jury was deficient in defining the intent required under the statute and other elements of the offense (Pet. 38-51). The mere quotation of the pertinent part of the court's instructions refutes this contention (R. 74-75):

> In this case, the form of theft charged—or, rather, the contention that the Government makes at this particular trial—is the gaining of personal property from the owner by trick or fraud. If that is done—if possession is gained by trick or fraud—the law treats possession as not being transferred but remaining in the owner, and therefore the crime is larceny. That is, if a person by trick or fraud obtains the property of another *with the intent to convert it to his own use,* that would be larceny; and if the defendant was guilty of that in this case, he would be guilty under this indictment.
>
> It is necessary, however, in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained *there must be the fraudulent intent at that particular time of the party taking it to convert it to his own use.* If he takes it without that intent—if he takes it for the purpose of carrying out any agreement or arrangement and afterward converts it to his own use—that would not be larceny.

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the National Stolen Property Act (18 U.S.C. 2314) are authoritative as to the proper interpretation and application of the local larceny statute.

> The question here is, did the defendant acquire this property by trick or fraud, and at the time *intend to convert it to his own use,* and did later convert it to his own use. (Italics supplied.)

Petitioner's further contention that the jury was not fully and adequately instructed as to the theory of his defense (Pet. 38) is equally frivolous. For the court told the jury explicitly that if they believed him there was no larceny (R. 75-76):

> It is for you to determine, first, Was there any arrangement between the parties—between the complaining witness and the defendant—by which this money was to be used to bribe or pay the police? If it was intended as a fee for services that had been rendered or were to be rendered, then there is no larceny at all in the case and no criminal charge in it. The question is, was there an arrangement of that nature? And if so, did the defendant, at the time he received this money, intend not to carry out tnat arrangement but to convert it to his own use? If he did, then he would be guilty. But, as I said before, if there was no such agreement, or if the money was paid as a fee either for services that had been rendered or were to be rendered, then the defendant is not guilty under this charge, and there would be no criminal offense at all.

CONCLUSION

The decision below is correct and the case presents no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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